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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
MARVIN WINKFIELD,
Defendant and Appellant.

A105807

(San Mateo County
Super. Ct. No. SC052566A)

Defendant appeals from a judgment of conviction for possession of cocaine entered upon a plea of no contest. Defendant's court-appointed counsel has briefed no issues and asks this court to review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We affirm.

Defendant was originally charged with one count each of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) and possession of narcotics paraphernalia (Health & Saf. Code, § 11364). The information further alleged one strike prior under Penal Code section 1170.12, subdivision (c)(1), and two prior prison terms under Penal Code section 667.5, subdivision (b). Defendant initially pled not guilty to the charges.

Prior to trial, defendant moved to suppress evidence seized during an assertedly unlawful warrantless search of his person. The prosecutor opposed the motion on the ground that defendant was subject to a search condition under the terms of his parole. The arresting officer, Eric Acha, gave the following testimony at the preliminary hearing and at the hearing on the motion to suppress: At or around 11:45 p.m. on October 4, 2002, he and his partner were on patrol in Redwood City when they observed a vehicle

parked in front of a motel. A woman who appeared disoriented was sitting alone in the passenger seat of the car. She did not respond when Acha approached the car, and Acha believed she was either in some sort of distress or under the influence of some type of drug. When Acha spoke to the woman she identified herself and said she was with a man who had rented a room at the motel. She had just met the man and did not know his name. Based on the woman's responses and his experience and training, Acha suspected the woman was a prostitute.

When defendant came out of the building and approached the car, Acha's partner engaged defendant in conversation. Defendant was cooperative and acknowledged being on parole. Acha confirmed defendant's parole status and determined there were no outstanding warrants for defendant. Based solely on defendant's parole status, the officers searched defendant and found .23 grams of cocaine folded inside a \$10 bill in defendant's pocket and a glass smoking pipe in defendant's sock. Acha then arrested defendant.

The trial court denied the motion to suppress on the ground that the evidence was seized pursuant to a lawful parole search. In *People v. Reyes* (1998) 19 Cal.4th 743, 752, the California Supreme Court held that reasonable suspicion is not a prerequisite to conducting a parole search and that a parole search "is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing." The court explained further that its "holding that particularized suspicion is not required in order to conduct a search based on a properly imposed search condition does not mean parolees have no protection. As explained in *People v. Clower* (1993) 16 Cal.App.4th 1737, 'a parole search could become constitutionally "unreasonable" if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer.' (*Id.* at p. 1741; *United States v. Follette* (S.D.N.Y. 1968) 282 F.Supp. 10, 13; see *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004 [a search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformatory or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee]; *People v. Bremmer*

(1973) 30 Cal.App.3d 1058, 1062 [unrestricted search of a probationer or parolee by law enforcement officers at their whim or caprice is a form of harassment].)” (*People v. Reyes, supra*, 19 Cal.4th at pp. 753-754.) Here, Acha and his partner were engaged in appropriate police activity when they approached the woman in defendant’s car and struck up a conversation with defendant. Acha’s suspicion that the woman in defendant’s car was a prostitute and might be under the influence of a narcotic was reasonable. Having lawfully determined that defendant was subject to a search condition, it was not arbitrary or harassing to search defendant. Accordingly, there was no error in the denial of defendant’s motion to suppress.

Defendant also filed a “Petition for Writ of Coram Nobis” that sought to vacate the prior Monterey County conviction for which he was on parole at the time of the search. Defendant filed the petition in propria persona, but his court-appointed attorney argued the motion on his behalf. Defendant argued that his parole was unlawful because prior to entering the guilty plea in the Monterey County case he had not been advised that he would have to serve a parole term upon completion of the 32-month prison sentence. As explained by defendant’s attorney at the hearing on the petition, “The issue I’m asking you to consider is the fact that my client was not on parole at the time of the search by Deputy Acha. And since he was not on parole, I would ask that any evidence seized by Deputy Acha be stricken from this record and made inadmissible.” Defendant made clear that his motion was to vacate the prior judgment, not merely to strike the prior conviction for purposes of sentencing in the present case.¹ “[A] *motion to set aside a plea of guilty and vacate a prior judgment of conviction* . . . must be initiated by the defendant in the action in which the prior judgment was *rendered* [citation].” (*Gonzalez v. Municipal Court* (1973) 32 Cal.App.3d 706, 710; see also *People v. Sumstine* (1984) 36 Cal.3d 909, 920-921 [“ ‘The striking of an allegation of a prior conviction from the complaint in a pending criminal proceeding is not the equivalent of a determination that the defendant

¹ Moreover, as discussed below, the Monterey County conviction did not affect the length of defendant’s sentence in this case.

did not, in fact, suffer the conviction [citation]. . . . [T]he defendant must continue to fulfill the conditions of the sentence imposed upon him as a result of the prior conviction unless he successfully moves to vacate or set aside the judgment *in the original action*’ ” (Italics added.))].) Thus, the trial court correctly denied the motion on the ground that it did not have jurisdiction to vacate the prior judgment.²

Thereafter, pursuant to a negotiated plea, defendant pled no contest to possession of cocaine and admitted the prior strike. In return it was agreed that the trial court would consider a motion to strike the prior strike, and depending on the probation report, would consider a residential treatment program. The maximum prison sentence that could be imposed under the plea was two years for the conviction, doubled to four years for the strike. Defendant was properly advised of his constitutional rights, parole consequences, maximum fines, and narcotics offender registration.

At the sentencing hearing the trial court denied defendant’s motion to strike his prior strike conviction, and noted but did not discuss defendant’s request to be sentenced pursuant to the alternative commitment statute for Vietnam veterans (Pen. Code, § 1170.9). The trial court also found that a residential treatment program would not be suitable for defendant in light of his history of failed programs. Defendant was sentenced to prison for the mitigated term of 16 months, doubled to 32 months for the prior strike, and he was ordered to register as a narcotics offender. Defendant was awarded 464 days of actual time served and 232 days of local conduct credits.

The trial court did not abuse its discretion in refusing to strike defendant’s prior strike conviction. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530-531.) As explained by the trial court, “As it relates to the issue of the striking the strike, what I

² We question the assertion made in the trial court that it would have been necessary to suppress the evidence seized if the prior judgment were vacated. The judgment, which included the parole order, was in effect at the time of the search and defendant was subject to a search under the conditions of his parole. A subsequent determination that defendant should not have been on parole would not defeat Acha’s good faith reliance on the judgment in effect at the time of the search. Nonetheless, it is unnecessary to reach this issue as the trial court clearly lacked jurisdiction to vacate the prior judgment.

do look for in that regard is an individual who is coming before the court with an offense where a strike is alleged but prior to this new offense there has been appreciable amount of time wherein the individual has not been involved with the legal system. And reviewing your background, Mr. Winkfield, that does not appear to be the case. And, in fact, you were on a grant of parole at the time this offense occurred.” Likewise, the trial court did not abuse its discretion by failing to consider alternate sentencing for defendant as a Vietnam veteran. (*People v. Duncan* (2003) 112 Cal.App.4th 744, 748 [no error where court fails to consider sentencing under section 1170.9 because “sentencing under that statute remains ‘a nonexistent sentencing option’” because no such federal program has been established].) Accordingly, there was no error in the sentence imposed, and no issues that require further briefing.

Disposition

The judgment is affirmed.

Pollak, J.

We concur:

McGuiness, P. J.

Corrigan, J.